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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1131

SAMUEL CHANEYFIELD,

Petitioner,

v.

THE CITY OF NEW YORK, and
MATHEWS & CHASE,

Respondents.

BRIEF OF RESPONDENT MATHEWS & CHASE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion Below

Opinion of the United States Court of Appeals dated November 14, 1975, Docket No. 75-7183 is reported at 525 F. 2d 1333 (1975).

Jurisdiction

The petitioner has invoked jurisdiction of this court under Title 28 U.S.C. Section 1254 (1).

Statutes Involved

The petitioner has set forth Sections 721, 722, and 738, of the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Section 731, *et seq.* In addition to such provisions, materially involved is Section 733 of the same act, which provides as follows:

§733. Penalties for violations; Civil and Criminal Liability

(a) Whenever the operator (1) violates or fails or refuses to comply with any order of withdrawal and debarment issued under Section 727 or Section 728 of this title, or (2) interferes with, hinders, or delays the Secretary, or his duly authorized representative, in carrying out his duties under this chapter, or (3) refuses to admit an authorized representative of the Secretary to any mine which is subject to this chapter, or (4) refuses to permit the inspection or investigation of any mine which is subject to this chapter, or an accident, injury or occupational disease occurring in or connected with such a mine, or (5) being subject to the provisions of Section 732 of this title, refuses to furnish any information or report requested by the Secretary, a civil action for preventative or temporary injunction, restraining order, or other order, may be instituted by the Secretary in the District Court of the United States for the District in which the mine in question is located or in which the mine operator has its principal office.

(b) Whoever violates or fails or refuses to comply with an order of withdrawal and debarment issued (1) under subsection (a) of Section 727 of this title or (2) under subsection (b) of Section 727 of this title if the failure to comply with an order of abatement has created a danger that could cause death or serious physical harm in such mine immediately or before the imminence of such danger can be eliminated, shall upon conviction thereof be punished for each such offense by a fine of not less than $100, or more than $3,000, or by imprisonment not to exceed sixty days, or both. In any instance in which such office is committed by a corporation, the officer or authorized representative of such corporation who knowingly permits such offense to be committed shall, upon conviction, be subject to the same fine or imprisonment, or both.

Questions Presented

(1) Should a Petition for a Writ of Certiorari be granted in the absence of a conflict in decisions by Federal Courts of Appeals and where a determination by such a Court has conformed with the usual and accepted course of judicial proceedings?

(2) Does the Federal Metal and Non-Metallic Mine Safety Act create a private right of action on behalf of an injured person against a consulting engineer retained to ascertain that a sewage project, during construction, conforms to plans, designs and specifications?

(3) Does the dismissal of the petitioner's cause of action under the Federal Metal and Non-Metallic Mine Safety Act leave the petitioner without a remedy, notwith-

standing the civil action which had been commenced by the petitioner against the respondent and other parties, in the Supreme Court of the State of New York, County of Bronx?

Statement of Facts

On September 13, 1971, the petitioner, an Operating Engineer, sustained injuries during the operation of a diesel locomotive used to pull muck cars in the North River Water Pollution Control Project, which was to serve as a part of the sewer system of the City of New York. The respondent Mathews & Chase was the consulting engineer retained by the respondent City of New York, the latter being the owner of the sewage system.

The petitioner has alleged that a coupler between two of the muck cars disengaged, causing the loose muck cars to strike the rear of the muck car attached to the locomotive in which the petitioner was standing.

Prior Proceedings

On August 7, 1974, an action was commenced by the petitioner in the Supreme Court of the State of New York, County of Bronx, against various defendants, inclusive of the respondent Mathews & Chase. In that action, the petitioner failed to include the City of New York as a party defendant, but asserted the liability of the respondent Mathews & Chase, as consulting engineer, deriving from its consulting contract with the City of New York with respect to the construction of the sewage system.

Subsequently, on September 4, 1974, the petitioner commenced an action in the United States District Court for the Southern District of New York, naming as defendants

the City of New York and Mathews & Chase, asserting an action for damages pursuant to the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C. Section 731, *et seq.*

Respondent Mathews & Chase moved to dismiss the complaint in the United States District Court on several grounds, including lack of jurisdiction and the absence of a valid cause of action against the respondent Mathews & Chase under the Federal Metal and Non-Metallic Mine Safety Act. A hearing was conducted and the relief sought by respondent Mathews & Chase was granted; the Court, on its own motion, dismissed the action against the respondent The City of New York. The memorandum decision and order of United States District Judge Richard Owen noted that (1) the sewage system in which the petitioner was working was not a "mine" within the meaning of the Federal Metal and Non-Metallic Mine Safety Act; (2) that said act did not provide for a private right of action; and (3) that Mathews & Chase was not an "operator" within the meaning of the act.

Following service of a Notice of Appeal from that decision, petitioner moved for re-argument, and requested leave to amend the complaint so as to state a cause of action under the Federal Employers' Liability Act, 45 U.S.C., Section 51, notwithstanding that such request was not contained in the opposition papers to the Notice of Motion to Dismiss. United States District Judge Richard Owen denied the motion for re-argument.

In a unanimous opinion at 525 F. 2d 1333 (1975) the United States Court of Appeals for the Second Circuit held that the Federal Metal and Non-Metallic Mine Safety Act did not confer a private right of action, affirming the dismissal of the action. It was also held that neither the respondents City of New York nor Mathews & Chase held themselves out to the public as rail carriers and there-

fore the Federal Employers' Liability Act was inapplicable. In a footnote, the Court further observed that a state action for negligence was pending against the respondent Mathews & Chase, as well as against several other defendants.

POINT I

A review on a Writ of Certiorari is within the sound judicial discretion of the Court and should be denied in the absence of a conflict in decisions and where the Court of Appeals has conformed with the accepted and usual course of judicial proceedings.

The petitioner has attempted to invoke the jurisdiction of this Court pursuant to Title 28 U.S.C. Section 1254 (1), contending that the United States Court of Appeals for the Second Circuit overlooked the intent of Congress when it promulgated the Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C. Section 731 *et seq.* It is conceded that no other Federal Court has rendered a contrary determination.

The petitioner seeks judicial creation of a cause of action, though Congress has intentionally chosen to relegate the petitioner to available state law remedies.

It is apparent that review on Certiorari is conferred for the limited purposes of securing uniformity of decisions between those Courts in the various circuits and to determine issues of importance which it is in the public interest to have decided by this Honorable Court of last resort. Rule 19 of the Supreme Court Rules, 28 U.S.C. provides, in part:

> "Rule 19. Considerations governing review on Certiorari:
>
> (1) A review on Writ of Certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> • • •
>
> (b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a Lower Court, as to call for an exercise of this Court's power of supervision.
> • • •"

Significant is the fact that a Writ of Certiorari is not a matter of right but of sound judicial discretion. This doctrine was enunciated in *Magnum Import Company* v. *Coty,* 262 U.S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922, 924 (1923) wherein it was held:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for Certiorari do not appreciate these necessary limitations upon our issue of the Writ."

In *Layne & Bowler Corp.* v. *Western Well Works, Inc., et al.,* 261 U.S. 387, 393, 43 S. Ct. 422, 67 L. Ed. 712 (1923)

Chief Justice Taft speaking for a unanimous Court, pronounced:

> ". . . [I]t is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals."

This basic and fundamental premise has been oft times recognized and applied by this Court prior to entertaining a review of a Lower Court Decision. *Rice* v. *Sioux City Park Cemetery, Iowa,* 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

It is emphasized that the case at bar does not involve a conflict in the Courts of Appeals and as hereinafter indicated, an important question of Federal law is not presented inasmuch as the legislative provisions of the Federal Metal and Non-Metallic Mine Safety Act, *supra* are clear in intent and the petitioner is not without a remedy.

POINT II

The United States Court of Appeals for the Second Circuit properly affirmed the dismissal by the United States District Court on the basis that the Federal Metal and Non-Metallic Mine Safety Act does not provide for a private right of action.

Respondent Mathews & Chase is cognizant of the need for safety which has been stressed at length in the petition for Writ of Certiorari before this Court. Nevertheless, although safety is of great public concern and interest, that criterion alone is not determinative of the issues here presented.

The Federal Metal and Non-Metallic Mine Safety Act, *supra* was, of course, enacted to afford the United States Government authority and jurisdiction to promote safety in the mines which fall within the Act. The Act empowers the Secretary of the Interior to conduct investigations of mines in order to obtain information relating to health and safety conditions and to develop, promulgate and enforce health and safety standards. 1966 U.S. Code Cong. and A.D.M. News, P. 2846. The Act further provides, pursuant to Section 727, that the Secretary of the Interior, or an authorized representative, may issue an order requiring the operator of a mine to cause all persons, except those specified, to be withdrawn and barred from entering a mine in a situation of danger. In the event that a violation of one of the mandatory standards promulgated by the Secretary of the Interior is not corrected, then the Secretary or an authorized representative is empowered to make an order barring all persons from the mine.

It is noted that Section 733 of the Federal Metal and Non-Metallic Mine Safety Act, *supra* is the only section which relates to penalties. That Congress had the authority to create a private civil cause of action is beyond dispute. *See, e.g.* Federal Employers' Liability Act, 45 U.S.C. Section 51; Jones Act, 46 U.S.C. Section 688. That it specifically did not create such a private cause of action by reason of a violation of the provisions of the Federal Metal and Non-Metallic Mine Safety Act is also beyond dispute. Nothing in the Act, expressly or by implication, grants to any injured miner a new cause of action beyond those elsewhere found at law. For this reason, no cause of action at law exists in favor of the petitioner pursuant to the Federal Metal and Non-Metallic Mine Safety Act ***supra.***

POINT III

The Court should not usurp the constitutional powers of Congress and judicially create a cause of action which legislatively does not exist.

It is fundamental and hallowed principle of constitutional law that the Courts will neither interfere with nor encroach upon the legislative prerogative of Congress, which alone has the power to promulgate, modify and repeal laws. In like manner, the judiciary has long adopted the practice of not trespassing upon the domain of Congress by judicial abridgment, modification, enlargement or repeal of legislative enactments. *McCray* v. *United States,* 195 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904). The Supreme Court, in reviewing the effect of the Federal Soldiers' and Sailors' Civil Relief Act upon a foreclosure, stated, in *Ebert* v. *Poston,* 266 U.S. 548, 554, 45 S. Ct. 188, 69 L. Ed. 435 (1925):

> "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the Legislature therein expressed. A casus omissus does not justify judicial legislation."

Again, with respect to a review of the Bankrupt Act of 1898, it was noted:

> "It is the province of the Court to enforce not to make, the laws, and, if the law works inequitably, the redress, if any, must be had from Congress." *New Jersey* v. *Anderson,* 203 U.S. 483, 490, 27 S. Ct. 137, 51 L. Ed. 284 (1906).

See *Blount* v. *Rizzi,* 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971); *Schnell* v. *Peter Eckrich & Sons, Inc.,* 365 U.S. 260, 81 S. Ct. 557, 5 L. Ed. 2d 546 (1961); *Thornley* v.

United States, 113 U.S. 310, 5 S. Ct. 491, 28 L. Ed. 999 (1885).

Although the Courts may construe statutes, it is held that, in keeping with the general rule against judicial legislation, they may not seek to further define the intent of Congress by interpolating words which the legislature has intentionally omitted.

It has always been a matter of historic integrity for this Court to decline to accept the petitioner's construction of a statute at issue which would be tantamount to the assumption of judicial legislation which this Court has scrupulously and vigorously avoided. Appropriately, it was held in *Hobbs* v. *McLean,* 117 U.S. 567, 579, 6 S. Ct. 870, 29 L. Ed. 940 (1886):

> "When a provision is left out of a statute, either by design or mistake of the legislature, the Courts have no power to supply it. To do so would be to legislate and not to construe."

Accord, Pirie v. *Chicago Title & T. Co.,* 182 U.S. 438, 21 S. Ct. 906, 45 L. Ed. 1171 (1900).

It is respectfully submitted that the very Petition for Writ of Certiorari filed herein has acknowledged that the Federal Metal and Non-Metallic Mine Safety Act, *supra,* does not provide for a private cause of action; the request that the Court create such a remedy should be therefore denied.

POINT IV

Dismissal of the Petition for Writ of Certiorari will not leave the petitioner without a remedy.

In seeking review, the petitioner has contended that the failure of the United States Court of Appeals for the Second Circuit to pass upon certain issues arising under the Federal Metal and Non-Metallic Mine Safety Act, *supra* has had the effect of leaving the petitioner bereft of remedy. However, the petitioner has commenced a companion action in the Supreme Court of the State of New York, County of Bronx, wherein the occurrence of September 13, 1971 is the subject of suit and in which negligence is asserted against the respondent Mathews & Chase as well as other party defendants. Although the City of New York was not named a defendant in that lawsuit, any of the defendants may, pursuant to applicable New York indemnity law, implead the City of New York as third-party defendant.

If, in fact, the petitioner has been caused a personal injury by reason of negligence of any of the defendants in the State Court action, then petitioner has a viable cause of action at common law, which is being vigorously prosecuted.

Under these circumstances, there would appear to be no valid reason, legal or equitable, for this Court to permit the petitioner the use of the Federal Courts as a means by which to seek a separate adjudication against the respondents herein, through strained interpretations of Federal Laws never intended to be applied to situations such as are here at issue.

CONCLUSION

It is respectfully submitted, that for all of the above reasons, the petitioner has failed to sustain the heavy burden required to invoke the Court's jurisdiction pursuant to Supreme Court Rule 19, and the Petition for a Writ of Certiorari should therefore be denied in all respects.

Respectfully submitted,

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